FILED
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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 10-0218
* * * *

GREGORY S. HALL,

Plaintiff/Appellant,

vs.

DON HALL d/b/a DON HALL BUILDERS, DONNA HALL d/b/a TOWN & COUNTRY PROPERTY MANAGEMENT AND REAL ESTATE, DEBRA CERNICK d/b/a DEBRA'S MONTANA COUNTRY REAL ESTATE also d/b/a MONTANA COUNTRY REAL ESTATE, and JOHN D. HEINLEIN,

Defendants/Appellees.

* * * *

APPELLEE JOHN HEINLEIN'S BRIEF

* * * * *

On Appeal from the District Court of the
Nineteenth Judicial District of the State of Montana,
in and for the County of Lincoln

* * * * *

APPEARANCES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

Whether the court erred in granting the motions in limine.

Whether the court erred in granting summary judgment.

STATEMENT OF THE CASE

On or about March 5, 2007, Greg Hall, hereinafter "Hall", filed a Complaint against Don Hall, d/b/a Don Hall Builders, hereinafter "Don Hall"; Donna Hall, d/b/a Town and Country Property Management and Real Estate, hereinafter "Donna Hall"; Debra Cernick, d/b/a Montana Country Real Estate, hereinafter "Cernick"; and John D. Heinlein, hereinafter "Heinlein". On March 6, 2008, Hall amended the Complaint. The Amended Complaint asserted the claims of constructive fraud, intentional fraud, negligence and negligent misrepresentation against all Appellees/Defendants. In summary, Hall alleged that his building inspector, Don Hall; his realtor, Donna Hall; the seller, Heinlein, and Heinlein's realtor, Cernick, collectively withheld from him adverse conditions of the home that he had purchased.

On February 19, 2008, the district court entered a default judgment against Don Hall on the issue of liability. *Default Judgment* attached to Appendix as Exhibit A.

Cernick timely moved the court to exclude evidence related to the toxicity

of the mold; Hall's personal injury alleged to be caused by exposure to mold; and mold abatement costs. Cernick further moved the court to exclude evidence of damages caused from Hall's willful abandonment of the premises at issue and evidence related to the real estate standard of care. Heinlein and Donna Hall joined Cernick's Motion. On January 26, 2009, the court granted the Motion. *Order RE: Defendants' Motions in Limine* attached to Appendix as Exhibit B.

Donna Hall timely moved the court to exclude evidence of insurance coverage, the presence of asbestos in the home and the mention at trial that evidence has been excluded. Heinlein and Cernick joined this motion. On January 26, 2009, the court granted the Motion. *Order RE: Defendants' Motions in Limine* attached to Appendix as Exhibit B.

Cernick, Donna Hall and Heinlein all requested summary judgment as to Hall's respective claims. Cernick requested summary judgment based upon: 1) Hall's imputed knowledge of the real estate defects; 2) preemption by the Montana Real Estate Licensing Act; 3) failure to plead fraud with particularity; and 4) Hall's failure to read and review the materials provided to him by his agent was the sole cause of his damages. Heinlein and Hall joined Cernick's motion. The court granted Cernick's request for summary judgment on February 18, 2009. *Order Granting Defendants' Motions for Summary Judgment* attached to

Appendix as Exhibit C.

Donna Hall requested summary judgment with respect to: 1) Hall's demands for attorney fees; 2) Hall's demands for personal property damage; 3) Hall's request for diminution of value to the real property; and 4) Hall's claims for damages related to the sewer and furnace repair or replacement. Heinlein joined this Motion. Hall filed no response. The court deemed the motion well taken. *Order Granting Defendants' Motions for Summary Judgment,* attached to Appendix as Exhibit C.

Heinlein requested summary judgment claiming that Heinlein owed no duty of care to Hall, other than to not misrepresent known defects in the home. Heinlein argued that Hall failed to produce facts tending to prove that Heinlein, or his agent, had knowledge of defects claimed by Hall. The court granted Heinlein's request for summary judgment. *Order Granting Defendants' Motions for Summary Judgment,* attached to Appendix as Exhibit C.

On August 4, 2009, the Court remanded the matter to district court for final judgment. On April 12, 2010, the court issued final judgment as to Don Hall. On May 3, 2010 Hall appealed from the final order.

STATEMENT OF FACTS

In 2005, Heinlein purchased a house from his parents who had resided in

the home for "a year or two". *Depo. Heinlein*, p. 35, lines 13-18, p. 54, line 23, p. 55, line 1.[1] The small fifty year old home is located on Idaho Street near the heart of Libby, Montana. *Depo. Donna Hall,* p. 37, lines 9-16; *Depo. Hall,* p. 39, lines 2-5, p. 172, lines 19-25.[2] Following his purchase, Heinlein lived in the house for over a year. *Depo. Heinlein,* p. 42, line 23, p. 43, line 2. During his ownership, Heinlein made numerous repairs including disconnecting the leaking furnace, adding wall heaters, installing a wood stove and updating the bathrooms. *Depo Heinlein,* p. 13-15.

On one occasion in 2005, a small amount of water leaked from the downstairs sewer drain. *Depo. Heinlein,* p. 13, lines 1-23, p. 56. Heinlein hired a plumber to assist him in resolving the problem. *Depo. Heinlein,* p. 57. The plumber snaked the drain; resolved the clog and the drain flowed freely thereafter. *Depo Heinlein*, p.13, p. 33, lines 4-10, p. 57-58. No further repairs were necessary as to the leak; no damage occurred to the home; no insurance claim was made; and the problem did not reoccur. *Depo. Heinlein,* p. 49, lines 5-16, p. 58.

Prior to Heinlein's purchase, the Environmental Protection Agency (EPA) inspected the home for the presence of asbestos. *Depo. Heinlein,* p. 33, lines 13-

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[1] John Heinlein Deposition lodged with the court as Court Document 63.

[2] Donna Hall Deposition lodged with the court as Court Document 65.

25. The EPA discovered no asbestos on the property. *Depo. Heinlein,* p.33, lines 13-21.

To accommodate his fiancee's pets, Heinlein determined that it was necessary to sell his home and move to a quieter location. *Depo. Heinlein,* p. 43, lines 3-10. Heinlein enlisted the services of his sister, Cernick, a realtor. *Depo. Cernick,*[3] p. 7, lines 17-23; *Depo Heinlein,* p. 19, lines 15-16. Cernick prepared a Multiple Listing Service (MLS) listing sheet that explained the home's features. *Exhibit One to Amended Complaint*, Court Document 75. The listing noted a $95,000 sales price. *Exhibit One to Amended Complaint*, Court Document 75. The listing further stated "Heat" - "wall heater, woodstove and hot water" and "Fuel" - "electric, wood and oil". *Exhibit One to Amended Complaint*, Court Document 75. Heinlein does not recall reviewing the MLS listing, but he does recall seeing an advertisement in the local newspaper. *Depo. Heinlein,* p. 21, lines 12-15. The contents of the advertisement were not established.

Heinlein provided Cernick with a standard seller's disclosure. The Disclosure listed the defects in the home known to Heinlein, specifically that:

> [O]wner hear (sic) water sounds in basement and contacted City of Libby. No signs of water or excessive water bills;

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[3] Debra Cernick Deposition lodged with the court as Court Document 64.

> [F]urnace never used. However was accidently turned on and pipe leaked in basement. Furnace was professionally disconnected.
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> *Depo. Heinlein,* p. 45, lines 21-25, *Seller's Disclosure Exhibit Number 3, Heinlein Deposition, Court Document 63.*

Heinlein knew of no other defects in the home. *Depo. Heinlein,* p. 45, lines 21-25. In an agent's showing, attended by fellow realtor Donna Hall, Cernick volunteered that the furnace was not operable. *Depo. Donna Hall,* p. 35, line 6, p. 36, line 19.

Hall hired Donna Hall, no relation, to assist him in purchasing his first home. *Depo. Hall,* p. 144, lines 4-7.[4] Hall viewed the Heinlein home two times, approximately one hour each, with Donna Hall. *Depo. Hall,* p.82, lines 18-25, p. 83, lines 1-20. Donna Hall testified that she advised Hall during the visit that the furnace did function. *Depo. Donna Hall*, p. 10, lines 4-17. Hall disputes this claim. *Depo. Hall*, p. 124, lines 5-9.

Hall liked the location of the home, and made an offer of $87,000 on the home. *Depo Hall,* p. 81, lines 8-19. Following receipt of Hall's offer, Cernick provided a complete four page copy of the Seller's disclosure, which included the defects known to Heinlein. *Depo. Donna Hall*, p. 43, lines 8-18. Donna Hall reviewed the document and confirmed that four pages were present. *Depo. Donna Hall,* p. 41, line 16- p. 42, line 19. Donna Hall testified that she provided the

[4] Greg Hall Deposition lodged with the court as Court Document 145.

document to Hall. *Depo. Donna Hall,* p. 42, line 20- p. 43, line 1. Hall claims that Donna Hall failed to provide to Hall page two of the Disclosure, which contained information regarding the furnace. *Depo. Hall,* p. 91, p. 108, lines 11-16. Hall testified that had he known that the furnace had been disconnected, he would not have purchased the house. *Depo Hall,* p. 148, line 22- p. 151, line 1.

Cernick and Heinlein also provided Donna Hall with a standard mold disclosure form. *Depo. Heinlein*, p. 28, *Exhibit 4 to Amended Complaint*, Court Document 75; *Depo. Heinlein*, p. 28, lines 17-29. Donna Hall does not recall if she received the mold disclosure before or after closing. *Depo. Donna Hall,* p. 60, lines 4-10. Hall did not sign the disclosure. *Exhibit 4 to Amended Complaint,* Court Document 75.

As a contingency of the sale, Hall requested a home inspection to determine if the home had defects. *Depo. Hall*, p. 83, lines 21-25. Don Hall, husband of Donna Hall, performed the home inspection. *Depo Hall,* p. 84, lines 3-12. Don Hall reported no material defects with the home. *Depo Hall*, p. 87, lines 7-13. Hall purchased the home for $93,000. *Depo. Heinlein, Exhibit 1, Buy-Sell Agreement.*

Hall moved into the home and discovered that the furnace had been disconnected. *Depo. Hall*, p. 99, lines 1-5. Hall contacted Donna Hall, who

referred Hall to the Seller's Disclosure. *Depo. Hall,* p. 99, lines 1-5; *Depo. Donna Hall,* p. 23, lines 16-24.

Hall contacted attorney, William Douglas. *Depo. Hall*, p. 23. Mr. Douglas referred Hall to Scott Curry, hereinafter "Curry". *Depo. Hall*, p. 23, lines 14-23. Following his termination from the US Forest Service, Curry, a licensed engineer, commenced a vocation as "expert witness" with Maxwell Battle and William A. Douglas serving as his primary referral sources. *Depo. Curry,* p. 119, lines 7-9; *Supplemental Affidavit of Scott A. Curry in Opposition to Motions for Summary Judgment and Motions in Limine, Exhibit One.* Curry claims expertise in, among other fields, accident reconstruction, asphalt, road access, crime investigation, septic systems, ballistics, road maintenance, construction and mold. *Supplemental Affidavit of Scott A. Curry in Opposition to Motions for Summary Judgment and Motions in Limine, Exhibit One.*

Curry inspected the home. Curry concluded that the home had numerous defects, including the presence of toxic mold, the presence of asbestos, faulty buried water lines, negative drainage and electrical wiring issues. *Depo. Curry,* p. 28-29.[5] Curry and Battle suggested that Hall vacate the house. *Depo Hall*, p. 13,

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[5] Scott Curry Deposition Exhibit 4 *Defendant Debra Cernick d/b/a Debra's Montana Country Real Estate d/b/a Montana Country Real Estate's Motions in Limine.* Court Document 107.

lines 12-19.

Hall claimed to be receiving medical treatment from Connie Boyd, his primary care provider, for mold related sickness. *Depo. Hall*, p. 44- p. 45, lines 1-14. Ms. Boyd denied treating Hall for anything related to mold. *Depo. Boyd*, p. 12, line 17, p. 13, line 12.[6]

At his deposition, Curry testified that he is an engineer, not an industrial hygienist or medical professional. *Depo. Curry*, p. 15, line 11- p. 16, line 11, p. 34, lines 4-13. Curry testified that he cannot give an opinion related to Hall's medical condition(s). *Depo. Curry*, p. 15, line 11- p. 17, lines 3-8. Curry did not review Mr. Hall's medical records or consult with Hall's doctors. *Depo. Curry,* p. 15, line 11- p. 16, line 11.

Curry holds no certifications in mold investigation, testing or re-mediation. *Depo. Curry*, p. 34, line 14- p. 36, line 8. Curry has no training in the investigation of mold. *Depo. Curry*, page 34, line 14- p. 36, line 8. Curry has no training in mold abatement, and holds no abatement certificates. *Depo. Curry,* p. 46, lines 14-21. Curry admits that he is not qualified to perform mold abatement. *Depo. Curry,* p. 47, line 19- p. 48, line 14. Curry conceded that proper mold testing includes air sampling, which he did not conduct. *Depo. Curry,* p. 38, lines

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[6] Connie Boyd Deposition lodged with the court as Court Document 144.

4-8, p. 53, lines 21-23. Curry further concedes that the mold he identified in the Hall home would have been difficult, if not impossible, to identify by simply walking through the property. *Depo. Curry,* p. 33, line 2, p. 34, line 3.

At his deposition, Curry testified that he found an open container of vermiculate that appeared to be the Libby type (containing amphibole asbestos). *Depo. Curry,* p. 114. Curry contacted the EPA to find out whether or not the house had been inspected and discovered that it had been. *Depo. Curry,* p. 114. According to Curry, the EPA supposedly removed the container. *Depo. Curry,* p. 114. Curry testified that he had no reports that the substance contained Libby amphibole asbestos. *Depo. Curry,* p. 114. Curry assured Appellees' counsel that "I will not be testifying at trial that there is vermiculite in the attic". *Depo. Curry,* p. 114. Hall presented no other witnesses that could testify that the home contained asbestos.

As part of discovery, Heinlein provided to Hall the names of all persons known to Heinlein who performed services on the home, including the plumber, heating contractor, electrician and window installers. *Depo. Heinlein,* p. 13-16. Heinlein provided the names of the Libby City employees that he spoke with regarding the running water noise. *Depo. Heinlein,* p. 18, p. 19, lines 1-14.

Cernick hired an industrial hygienist to inspect the home for mold. *See,*

Defendant Debra Cernick d/b/a Debra's Montana Country Real Estate's Brief in Support of Motions in Limine, p. 7, Court Document 107. The conclusions of the industrial hygienist do not support Curry's findings. *See, Defendant Debra Cernick d/b/a Debra's Montana Country Real Estate's Brief in Support of Motions in Limine p. 7,* Court Document 107.

Hall failed to name any witness or produce any evidence that supported Hall's allegations that Cernick, Heinlein, Donna Hall and/or Don Hall had knowledge of the mold, allegedly faulty water lines, drainage problems and electrical problems. Hall supplied no witness or evidence (other than Curry's speculation) in support of his claim that the City of Libby employees advised Heinlein of faulty water or sewer lines.

As of October 20, 2008, Hall had expended between thirty and forty thousand dollars in expert and legal fees. *Depo. Hall,* p. 169, lines 2-7. Hall paid Curry between ten and fifteen thousand dollars. *Depo. Hall*, p. 25, lines 11-19. At the suggestion of Curry, Hall performed no repairs on his home. *Dep. Hall,* p. 34-36.

SUMMARY OF THE ARGUMENT

The court did not abuse its discretion in granting the motions in limine. Hall produced no evidence that contradicts the EPA's finding that the home

contains no asbestos. Curry, an engineer, is not qualified to render a medical opinion as to toxicity of mold or the adverse effects of mold as to Hall's health. Curry, by his own admission, is not qualified in mold abatement. Curry cannot change his deposed testimony by filing a supplemental affidavit contradicting his prior testimony.

The court correctly granted summary judgment. Hall failed to present any facts that Heinlein misrepresented the condition of the home to Hall. To the extent that Heinlein knew of defects, Heinlein and his agent, Cernick, presented those defects to Donna Hall, i.e., the defective furnace and the sound of running water. To the extent that other defects are alleged by Curry, Hall failed to establish any evidence tending to prove that Heinlein or Cernick had knowledge of the defects. The court correctly ruled that the fraud claims were not pled with particularity, as required by M.R. Civ.P. 9(b). General averments to facts asserted against all Defendants/Appellees without establishing reliance, materiality, ignorance, duty and injury is not sufficient to establish fraud.

ARGUMENT

I. THE COURT DID NOT ERR IN GRANTING THE MOTIONS IN LIMINE.

A. STANDARD OF REVIEW.

This Court reviews the court's ruling on Motions in Limine to determine if

the court abused its discretion. *State v. Brasda,* 2003 MT 374, ¶ 14, 319 Mont. 146, 82 P.3d 922. The court abuses discretion when the court acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. Supra at ¶ 14. Hall's claims that the standard of review is "de novo" is in error.

B. ASBESTOS IN THE HOME.

As noted in the statement of facts, Curry located vermiculate, which "appeared to be the Libby type" (vermiculate containing asbestos). Curry conducted no testing of the material. Curry contacted the EPA, who confirmed that they had tested the house for the presence of asbestos. Mr. Curry assumed that the EPA removed the container. Curry does not know if the material was tested for asbestos, or if it contained asbestos. Curry testified at his deposition that he will not be testifying (at trial) that the house contained vermiculite

The district court correctly held that Curry's conjecture that the material located in the attic may have contained asbestos is not sufficient to survive a motion in limine. The court correctly noted that Curry's subsequent efforts to claim that what he really meant was that he could not testify that the house contained asbestos "at this time" is "an extinction without a difference". *Order RE: Defendants' Motions in Limine,* p. 2.

C. TOXIC OR DANGEROUS MOLD, MEDICAL CAUSATION AND ABANDONMENT DAMAGES.

Hall sought to introduce evidence that Hall's exposure to mold in the home posed such a dangerous health risk to Hall as to prevent Hall's habitation in the home. Notably, Hall listed as witnesses various health care providers, including his primary health care provider, Connie Boyd, to support his claim. Neither Ms. Boyd, nor any other health provider, endorsed Hall's conclusions of adverse health effects occasioned by mold exposure.

Unable to produce medical experts to testify as to causation, Hall turned to his trusted engineer, Curry. Curry admitted in his deposition that he was not qualified to render medical opinions. However, in a post-deposition affidavit, Curry claimed that based upon a perusal of internet publications, he could express an opinion as to health impacts of mold, the health impacts to Hall, and the immediate cause to warrant Hall's abandonment of the home. In addition, Hall asserted that Tracy Axelberg, Donna Hall's attorney, served as mediator in two cases in which Curry purported to be a mold expert.

Curry's and Hall's claims border on fallacious. The district court correctly ruled that the development of a medical condition requires the testimony of a medical expert. See, *Hinkle v. Shepard School District No. 37*, 2004 MT 175, ¶ 38, 322 Mont. 80, 93 P.3d 1239.

For the first time on appeal, Hall claims various new theories which render Curry an expert on toxicity of mold and health impacts of mold, such as his engineering licensing requirements. Hall further suggests that Hall can testify as to his medical symptoms and Curry could endorse the cause. Such arguments which were not asserted in the trial court may not be presented on appeal.

Matters presented to the Montana Supreme Court for the first time on appeal are untimely and will not be considered. *State v. Ferguson,* 2005 MT, 343, ¶ 38, 330 Mont. 103, 126 P.3d 463. This includes new arguments or changes in legal theories. *Ferguson,* ¶ 38. "[I]t is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider". *State v. Adgerson,* 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850 (overturned on other grounds).

D. MOLD ABATEMENT COSTS.

Hall offers no factual support for the conclusion that Curry is an expert in mold abatement, other than he is a licensed engineer and contractor. In his deposition, Mr. Curry unequivocally acknowledged that he is not qualified to perform mold abatement. However, in a post-deposition affidavit, he claimed qualifications in mold abatement costs. *Supplemental Affidavit of Scott A. Curry in Opposition to Motions for Summary Judgment and Motions in Limine,* Court

Document 129. It goes without saying that if you are not qualified to perform mold abatement, you are not qualified to give an expert opinion as to the costs of mold abatement. Mr. Curry's attempts to change his deposed testimony do not create a genuine issue of fact.

"An affidavit that contradicts prior testimony is deemed to create sham issues, and is not to be considered by trial courts as evidence on a motion for summary judgment." *Van. T. Junkins & Associates, Inc. v. US. Industries, Inc.,* 736 F.2d 656 (11th Cir. 1984). See also *Kaseta v. Northwestern Agency of Great Falls,* 252 Mont. 135, 138-39, 827 P.2d 804, 806 (1992) (stating that "a party cannot make a material issue of fact through use of their own contradictory testimony" and that "[a] district court may grant summary judgment where a party's sudden and unexplained revision of testimony created an issue of fact where none existed before.")

II THE COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.

A. STANDARD OF REVIEW.

The standard for review in considering the grant or denial of summary judgment is de novo. *Prosser v Kennedy Enterprises Inc,* 2008 MT 87, ¶ 10, 342 Mont. 209, 179 P.3d 1178.

The purpose of summary judgment is that of judicial economy that is

preventing any unnecessary delay and expense. *McDonald v. Anderson,* 261 Mont. 268, 272, 862 P. 2d 402 (1993); *Harland v. Anderson,* 169 Mont. 447 at 450, 548 P.2d 613 (1976) (overturned on other grounds). Summary judgment is an invaluable tool for unmasking shams or awarding clear-cut judgments pre-trial. *73 Am. Jur. 2d Summary. Judgment* § 1 (2001).

The initial burden lies with the movant to show that the pleadings, depositions, answers to interrogatories, admissions on file, affidavits, oral testimony, judicial notices, stipulations, exhibits, transcripts, or presumptions show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. M.R. Civ.P. Rule 56(c), *Slott v. Fox,* 246 Mont. 301, 305, 805 P.2d 1305 (1990).

Once this burden is met, it then shifts to the non-movant, who has an affirmative duty to set forth specific material facts showing that there is a genuine issue for trial. Rule 56(e), M.R. Civ.P. The non-movant's burden is neither a preponderance nor a scintilla, but rather that of reasonableness. Mere allegations or denials of the movant's pleadings will not suffice. M.R. Civ.P. Rule 56(e). The non-movant may not rest on fanciful, gauzy, speculative, or conclusory statements. *Hager v. Tandy,* 146 Mont. 531, 410 P.2d 447 (1965).

B. IMPUTED KNOWLEDGE OF DONNA HALL.

Hall makes great issue of the fact that Cernick failed to provide to Donna Hall a complete seller's disclosure. Regardless of disclosure, it is undisputed that Cernick told Donna Hall in a "walk through" that the furnace did not function and that it was disconnected. No dispute exists that Donna Hall knew that the furnace was inoperable.

The district court correctly concluded that Donna Hall's knowledge is imputed to Hall, under Mont. Code Ann. § 28-10-604. See, *William v. State Medical Oxygen and Supply, Inc.*, 265 Mont. 111, 117, 874 P.2d 1225, 1229 (1994), citing *Empire Steel Mfg. Co. v. Carlson*, 191 Mont. 189, 196, 622 P.2d 1016, 1021 (1981). On appellate review, Hall makes no effort to dispute the authority cited by the court.

Notably, Hall conceded, and the district court ordered, that Hall could not present evidence as to damages related to the furnace and sewer. *Order Granting Summary Judgment,* p. 11, attached to Appendix as Exhibit C. Hall does not appeal from this district court order. Even if Hall could establish that Donna Hall lacked knowledge of the inoperable furnace, Hall will not be allowed to prove damages related to the furnace repair.

C. FAILURE TO PLEAD FRAUD WITH PARTICULARITY.

M.R. Civ.P. 9(b) requires that fraud be particularly pled[7]. In order to comply with Rule 9(b), a complainant must allege, with particularity, facts to support the following nine elements of fraud:

1) a representation;
2) the falsity of the representation;
3) its materiality;
4) the speaker's knowledge of its falsity or ignorance of its truth;
5) the speaker's intent that it should be relied on;
6) the hearer's ignorance of the falsity of the representation;
7) the hearer's reliance on the representation;
8) the hearer's right to rely on the representation; and
9) consequent and proximate injury caused by reliance on the representation.

Popinac v. Batter shell, 232 Mont. 507, 511, 759 P.2d 148, 151 (1988) (citation omitted).

Allegations of fraud cannot ordinarily be based "on information and belief" except as to matters peculiarly within the opposing party's knowledge. *Schlick v. Penn-Dixie Cement Corp.* (2d Cir. 1974), 507 F.2d 374, 379, cert. denied, 421 U.S. 976, 95 S.Ct. 1976, 44 LED.2d 467 (1975). To satisfy Rule 9(b) in the latter instance, the allegations must be accompanied by a statement of facts upon which the belief is founded. *Segal v. Gordon (2d Cir. 1972),* 467 F.2d 602, 608.

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[7] Constructive Fraud must also be pled with particularity. See, *State ex rel. State Compensation v. Berg, 279 Mont. 161, 927 P.2d 975 (1996).*

> The employment of such extravagant terms as 'fraud,' 'conspiracy,' and other words of like malign import, unaccompanied by a statement of fact upon which the charges of wrongdoing rest, is a useless waste of words.
>
> *Brandt, et al. v. McIntosh, et al.*, 47 Mont. 70, 72, 130 P. 413, 414 (1913) (citation omitted).

Hall's references to the general averments in his pleading do not satisfy the duty to plead with particularity. Hall must specifically state the nature of false material representation made by Heinlein; Heinlein's knowledge that the representation was false; Hall's reliance upon the representation; and Hall's injury. Hall's general averments do not satisfy these requirements.

Take for example the furnace; Hall claims that Heinlein's agent misrepresented that the house had "oil heat". While the house indeed had an oil furnace, the furnace leaked and was professionally disconnected by Heinlein. Heinlein reported the same to Hall's agent prior to closing. Following receipt of the seller's disclosure and MLS advertisement, Hall nevertheless hired an independent building inspector to inspect the home for defects. Hall failed to plead that Heinlein knew that Cernick's representations as to oil heat was false; that the representation was material; that Heinlein made the representation with the intent that it be relied upon; that Hall relied upon it; and that it caused Hall's injury. Failure to plead these elements defeat a conclusion of fraud or constructive

fraud.

With respect to the sewer; Hall claims that Heinlein misrepresented the condition of the sewer. Hall fails to assert with particularity any representation that Heinlein made with respect to the sewer, much less that Heinlein knew the representation was false; that Heinlein made the representation with the intent that it be relied upon; that Hall relied upon it; and that Hall's reliance was the proximate cause of his damage.

Hall failed to meet the requirements of M.R. Civ.P. Rule 9(b). Although Hall claims Heinlein committed "fraud" or "conspired" with Cernick to commit fraud, Hall failed to present facts in support of these allegations.

As noted by the district court, the averments must specifically define the representation, including time and place. *C. Haydon Limited v. Montana Mining Properties, Inc.*, 262 Mont. 321, 325, 864 P.2d 1253, 1256 (1993). Failure to do so is fatal. Hall's claims of fraud are based upon representations that Hall believes that Heinlein should have made, not on the representation made by Heinlein. Without some assertion of a false representation, neither Heinlein nor Cernick are guilty of fraud.

D. HOMEOWNER KNOWLEDGE OF DEFECTS.

Contrary to the claims of Hall, the law does not impose upon real estate

sellers the duty to disclose minor repairs performed on a home, or to outline all repairs performed on a home. The law does not require real estate sellers to inspect homes for buyers. The law does not require real estate sellers to provide proof that all fixtures in a home properly operate. The law simply imposes a duty upon sellers to not misrepresent a known material defect in a home.

The district court correctly noted that absent an obligation specifically imposed upon a seller by a buyer, the real estate's seller's duty to the buyer is to not misrepresent the condition of the home. See, *Parkhill v. Fuselier*, 194 Mont. 415, 418, 632 P.2d 1132 (1981). The seller is not liable for failure to report unknown defects at the time of sale. See, *Woodahl v. Matthews*, 196 Mont. 445, 452, 639 P.2d 1165, 1169 (1982); *Houdashelt v. Lutes*, 282 Mont. 435, 447, 939 P.2d 665 (1970). As cited by the district court:

> The common law provides reasonable protection to purchasers against fraud and deceit. However, it does not go to the romantic length of offering indemnity against the adverse consequences of folly and indolence or a careless indifference to information which would enlighten the purchaser as to the truth or falsity of the seller's assertions as to value. In such an instance, every person reposes at his own peril in the face of another's opinion when he has ample opportunity to exercise informed judgment.
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> *Dolson v. Imperial Cattle Co.,* 191 Mont. 357, 362 -363, 624 P.2d 993, 996 (1981).

On appellate review, Hall does not dispute this authority. Rather, Hall

contends that Heinlein's one time, repaired problem with the sewer imposed upon Heinlein a duty to report the repair as a material defect. In his Amended Complaint, Hall alleges that:

> [T]he City of Libby water department employees had advised Heinlein that there were leaks in the water service line between the water main and the property that the City of Libby water department employees had advised Heinlein that they could not locate the water shut-off for the water service line, that the water service line to the property passed under a structure on the adjacent lot, that the sewer line serving the property is encroached upon structure on the adjacent property such that repair or replacement is impractical.
>
> Amended Complaint Paragraph 8.

Significantly, Hall failed to disclose the names of the so-called Libby City employees. Hall failed to produce any evidence in support of this allegation. Hall failed to present Affidavits of these unnamed Libby City workers in opposition to Heinlein's motion for partial summary judgment. Based upon his failure to produce the names of these witnesses, the district court precluded Hall from calling unnamed Libby City employees at trial. *Order RE: Defendant's Objections to Plaintiff's Portions and Contentions of the Amended Pre-trial Order*, p. 3. Hall does not appeal from this Order.

Hall presents no evidence that Heinlein or Cernick misrepresented the condition of the home, much less that Heinlein or Cernick knew that they were making a misrepresentation. Conjecture that Heinlein should have known of

defects does not support a finding of liability. Heinlein's disclosure most certainly put Hall, and his inspector, on notice of defects in the home, including the sound of running water and the inoperable furnace. Hall's indifference to the disclosure and/or reliance on the inspector's report will not give rise to a cause of action against Cernick or Heinlein. The court did not err in granting summary judgment to Heinlein.

CONCLUSION

Indeed, a wrong has been committed in this case, but not by the Appellees. Curry's qualifications as a mold expert are marginal. Curry's qualifications to render a conclusion as to the health impacts to Hall are nil. Curry's speculation that the EPA may have missed a container of asbestos does not support a cause of action against Heinlein. Even if Hall could prove that Heinlein, Cernick, Donna Hall and Don Hall intentionally deceived him as to the condition of the sewer lines and furnace, Hall conceded that he can prove no damages on these claims. Surely, Hall's valuable resources would have been more wisely spent on resolving his concerns with his new home, not hiring an expert to support fanciful claims.

For the reasons stated above, Heinlein respectfully requests that this Court affirm the orders of the district court.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF COMPLIANCE

This is to certify, pursuant to Rule 27 of the Rules of Appellate Procedure, that this Reply Brief of Appellee/Cross-Appellant is double spaced, except for quoted and indented material, which is single spaced, and the document uses a proportionate typeface of not more than 10.5 characters per inch. There are twenty five (25) pages containing 5361 words in the document (excluding table of contents, table of citations, certificate of service, and certificate of compliance).

DATED this 2nd day of July, 2010.

Amy N. Guth
Attorney for Appellee Heinlein

CERTIFICATE OF SERVICE

* * * *

I, Ann M. Siefke, do hereby certify that on the 20 day of July, 2010, I mailed a true and correct copy of the foregoing Appellee Heinlein's Brief, upon the attorney for the Appellant and attorneys for Appellees, by mailing such copy, addressed to:

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